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TO: Joyce M. Grossnickle, Administrative Officer

FROM:

Richard J. McCain, Assistant County Attorney *RJM*

DATE:

March 18, 2008

| | |
|---|------------------------------|
| Subject: Dairy Maid Dairy Property | |
| Presenter (Name & Title): Richard J. McCain, Assistant County Attorney | |
| Requested Date: March 27, 2008 | Phone: (301) 600-2613 |

Type of Briefing: (Click box to select)



Administrative Business



Worksession



Closed Session



BOCC/BOE Mtg.



County/Municipal Mtg.



Public Hearing

Board Action Desired:



Decision



Guidance



Information

RECEIVED
MAR 18 2008
Administrative Officer

Staff Coordination: This topic has been thoroughly coordinated with the following Division/Department Directors, and they will have representatives at the presentation: (click to place a check mark in the appropriate box).

| | Staff | Initials | Date | Comments |
|-------------------------------------|------------------------------|------------|---------|----------|
| <input checked="" type="checkbox"/> | County Attorney | <i>RJM</i> | 3/18/08 | |
| <input checked="" type="checkbox"/> | County Manager | <i>AMH</i> | 3/18/08 | |
| <input checked="" type="checkbox"/> | Finance Director | <i>JFK</i> | 3/18/08 | |
| | Budget Officer | | | |
| | Fire & Rescue Services Dir. | | | |
| | Management Services Director | | | |

| | Staff | Initials | Date | Comments |
|--|---|----------|------|----------|
| | Permitting & Development Review Director | | | |
| | Planning Director | | | |
| | Public Works Director | | | |
| | Utilities and Solid Waste Management Director | | | |
| | Elected Officials | | | |
| | Independent Agencies | | | |
| | Other | | | |

Attachments:



Yes



No

PLEASE NOTE: The original and 10 copies of all attachments (including the coordination sheet) are required for the Board of County Commissioners' meetings, which includes the Joint BOCC/BOE Meeting and the County/Municipal Meeting.

If you are scheduled for a Closed Session, then you only need to submit the original and nine (9) copies of the back-up material. Back-up materials are due to the Administrative Officer ONE WEEK IN ADVANCE of the meeting. If materials are not received in a timely manner, you will be asked to reschedule your item.



OFFICE OF THE COUNTY ATTORNEY FREDERICK COUNTY, MARYLAND

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MEMORANDUM

TO: Board of County Commissioners

FROM: Richard J. McCain, Assistant County Attorney

R. J. M.

DATE: March 18, 2008

RE: Dairy Maid Dairy Property

ISSUE:

Will the Board of County Commissioners ("Board") reconsider its previous decision and convey its interest in certain Frederick, Maryland property to Dairy Maid Dairy, Inc. ("Dairy") without Dairy first contracting for a phase I environmental investigation of this property?

BACKGROUND:

Last fall, Dairy requested that the Board deed over its interest in certain property that is used by Dairy in Frederick, Maryland given that the Dairy paid off the loan the Board had obtained to finance Dairy's acquisition of and expansion onto this property. Specifically, in 1978, Dairy requested that the Maryland Industrial Development Financing Authority ("MIDFA") guarantee the financing of the acquisition of approximately 1.39 acres of land, the construction on this land of an approximate 17,000 square foot addition to Dairy's adjacent plant, and the purchase and installation of certain machinery and equipment in this new facility.

On November 20, 1978, the Board, as required by MIDFA, agreed to participate in this transaction by borrowing \$419,909.00 from the Francis Scott Key Bank and Trust Company ("FSK Bank") that was then made available to Dairy for this project. To secure the repayment of the Board's obligation to FSK Bank, Dairy (and its owners – Joseph and Helene Vona) transferred title to the real property and to certain personal property to the Board. The Board then granted a security interest in the property to secure the loan indebtedness due FSK Bank. At closing in 1979, the Board leased the property to Dairy (the "Lease") and assigned the Lease to FSK Bank. The Dairy's Lease payments were to pay off the FSK Bank's loan to the Board. This loan was paid off and on June 20, 1994 First

National Bank of Maryland (successor to FSK Bank) filed a certificate of loan satisfaction in Frederick County land records. Since 1979 the Board has held legal title to the property, as reflected in the Frederick County land records and on SDAT tax records, with the Dairy paying taxes on the property (the property has not been tax exempt).

Approximately 14 years after paying off this loan, the Dairy has requested clear title to this property. Section 16.2 of the Lease granted Dairy the option to purchase the property after the \$419,909.00 loan indebtedness had been satisfied for the purchase price of \$10.00. In August 2007 Dairy notified the Board of its exercise of this option and tendered \$10.00.

On September 20, 2007 the Board decided that as 14 years had passed since the loan was paid off, Dairy should undertake a phase I environmental investigation of the property – the Board being concerned with potential environmental liability – before the Board executes the requested deed and bill of sale. Dairy's counsel was notified of this request and furnished additional transaction records for his review. On December 12, 2007 counsel advised by telephone that Dairy would not contract for this environmental investigation and that he would send a letter to this effect.

The enclosed January 23, 2008 letter from Dairy's counsel followed. Note that Dairy does not absolutely refuse to contract for the requested environmental investigation. Rather, Dairy asks that the Board reconsider its request citing federal and state law which purports to insulate from environmental cleanup liability entities whose sole indicia of legal interest in property is to secure financing. The Office of County Attorney agrees that the cited statutes provide some protection from responsibility for environmental cleanup to the Board if considered to be a lender that has exercised no control over the property. As is often the case, we are unable to provide an absolute opinion that under no circumstances would a claim ever be made against the Board for environmental cleanup of this property that has been used since 1979 by Dairy.

The Board should also consider the advantage of providing the deed. Once the Board transfers its interest, that was acquired solely to secure a loan, the Board's potential liability would cease as to any future acts and the statute of limitations would continue to run. Further, while a phase I environmental investigation might indicate the property's environmental condition, requiring Dairy to conduct this investigation could be argued to reflect a degree of Board participation in the management of the property, beyond that required of a lender.

Memorandum to Board of County Commissioners

March 18, 2008

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RECOMMENDATION:

Staff requests the Board's advice on whether it will now execute the requested deed of real property and bill of sale for certain machinery and equipment, copies of which are enclosed, in favor of Dairy. If not, should staff again request that Dairy conduct a phase I environmental investigation of this property, with cleanup of identified contamination, before these conveyances would be made? In the latter event, Dairy's \$10 should be returned.

Enclosures

*file***GEORGE T. TYLER**

Attorney at Law
4201 Greenway
Baltimore, Maryland 21218-1135
Tel (410) 243-7566
Fax (410) 243-6566

January 23, 2008

Richard J. McCain, Esquire
Assistant County Attorney
Office of the County Attorney
Winchester Hall
12 East Church Street
Frederick, Maryland 21701

re: Dairy Maid Dairy, Inc.
request for re-conveyance of law title to real
property - Lease Agreement of April 4, 1979

Dear Mr. McCain:

This letter is a request that you ask the Board of County Commissioners to reconsider the request of the Dairy made under date of August 8, 2007, pursuant to article XVI of the Lease Agreement, that the County re-convey law title to the subject real property to the Dairy. This request was first considered by the Board at its meeting of September 20, 2007. Prior to this meeting, the Dairy's request had been reviewed by the Office of the County Attorney and the Director of Finance, and the granting of this request was recommended by them to the Board.

You advised me, following this meeting, that while a majority of the Board were in favor of granting the request, one member objected.

The grounds of this objection, as I understand them from your description, are that article XIII of the Lease Agreement contained an undertaking on the part of the Dairy to indemnify and hold harmless the County (section 13.12) which undertaking was asserted by this member of the Board to survive the termination of the Lease Agreement. The concerns of this member were exemplified by an hypothesis assuming that a discharge of some hazardous substance on the subject land occurred; and that at some indefinite time in the future, the Dairy having gone out of business, a then owner of the subject land or a then neighbor asserted a claim against the County (the Dairy not then being still in occupation and use of the subject property) and the County would be then without a source of indemnification. In conclusion, you advised me that this member of the Board requested that a "Phase I" environmental study be made, at the expense of the Dairy, before the Board re-conveyed law title to the subject land.

While you did not furnish me with a copy of any minutes of the Board's action or resolution or other formal action by the Board, once this concern has been raised I wish to respond to it.

Upon a review of the entire Lease Agreement, I do not find that any undertaking of the Dairy, including that of indemnification, survives the termination of the Lease except that created under section 3.4 for taxes if any, charged by the revenue service to either the bank or the County; and the clearing up of any obligations or liabilities of the Dairy which occurred

during the term of the Lease Agreement. There were no claims for taxes from the revenue service; there are no outstanding liabilities; there are no pending claims against the County arising out of the project. But I refer to these terms simply to indicate that if the County wished the indemnity language to have the broad effect now asserted by one member of the Board, that such requirement should have been expressly set out in the Lease Agreement and this was not done.

This request for a "Phase I" environmental study has the effect of adding a new (and expensive) obligation or term to the Lease Agreement which was not set out in the document. Further, it operates so as to, in effect, demand a form of indemnity not stipulated in the document and without there being any claim against the County and any exposure of the County to a liability that would give rise to any claim for indemnity.

A true reading and construction of the Lease Agreement, particularly article XIII, limits the undertaking to indemnify and hold harmless the County to the lease term or, at best, to a claim arising out of acts or omissions of the Dairy (and its contractors and sub-contractors) during the construction of the project and during the lease term. As an example of the fact that this undertaking does not survive the end of the lease is the stipulation in the indemnity requirement that the Dairy shall insure its undertaking to indemnify and hold harmless the County (set out at the end of section 13.12) and the fact that this insuring requirement, by reason of article VIII is expressly limited to "during the Lease Term" (section 8.3). This indicates that survivorship of the undertaking was neither required nor expressed in the Lease.

The Lease Term expired on January 1, 1990. I submit that neither the Dairy or the County have been given notice of a claim of any kind arising out of this project or the use of the land either at the end of the lease or in the intervening eighteen years. Article XVI provides that at "purchase" the Lease Agreement ends except as to then present liabilities. The terms of this Lease Agreement do not permit a claim in the indefinite future to give rise to any undertaking by the Dairy. The County only protected itself at time of "purchase" against tax liabilities under section 3.4 and then existing claims arising during the Lease Term which were required to be settled at "purchase". There were and are no such tax liabilities or claims.

Further, as to any contention that the undertakings of the Dairy go on and on, forever, the express language of the Lease with regard to each of the undertakings of the Dairy affirmative, negative or otherwise, limit these undertakings to the Lease Term. I do not list each of these examples here but merely repeat that if they, or any of them, were desired by the Board to survive the Lease Agreement, this should have been so stated.

Next, I do not understand and feel misplaced the concerns of a member of the Board that the County might, in the indefinite future, be exposed to a "lender's liability" because of some claim founded upon an environmental injury.

Under federal law (the Comprehensive Environmental Response, Compensation and Liability Act or CERCLA) the jurisdictional identification of an owner or operator responsible in the event of an environmental injury does not include:

"...a person that is a lender that without participating in the management of afacility, holds indicia of ownership primarily to protect the security interest of the person in the ...facility." 42 USCA 9601 (20)(E)(i)

A lender (including a successor or assignee of such person) is one that makes a bona fide loan, extension of credit, or acquires a security interest from a non-affiliated person. 42 USCA 9601 (20)(G)(iv)(V). In this project, the County was a lender, as was the participating bank.

Under State law while the concept is the same, the language is different. The County is not a "Responsible person" with regard to any environmental injury and in connection with any voluntary clean up program, the County is an "inculpable" person since by definition its not a responsible person. A responsible person does not include:

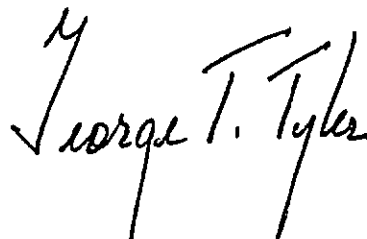
"...a person who, without participation in the day to day management of a site containing a hazardous substance, holds indicia of ownership in the site or in property located on the site primarily to protect a valid and enforceable lien unless that person directly causes the discharge of a hazardous substance on or from the site;

a holder of a mortgage or deed of trust on a site containing a hazardous substance or a holder of a security interest in property located on the site who does not participate in day to day management of the site unless the holder directly causes discharge of a hazardous substance on or from the site".
7-201 (u)(2) and 7-501 (j)(2)(ii) of the Environmental Article, Md. Code.

The language of the Lease makes it clear that the County (and the participating bank) had no control, management, oversight etc. of Dairy operations during the Lease Term, and, in fact, none was exercised during the Lease Term and the ensuing eighteen years. There was no default, foreclosure or "take over" of the project by the County (or the bank) prior to its completion and the end of the Lease Term. Consequently, I do not think the County has cause for concern over the possibility of someone asserting a claim against it for environmental injury in the indefinite future.

While I can only speak for the Dairy, I do feel these concerns of a member of the Board you related to me are misplaced and, therefore, request that you again present this request to the Board together with this letter, so that the equitable interest of the Dairy in the subject land which vested upon the end of the Lease Term and the release of the Deed of Trust in 1994 may be cleared of the remaining legal encumbrance.

Sincerely,



cc: Mr. Joseph H. Vona

NO TITLE EXAMINATION MADE
NO CONSIDERATION

THIS DEED, made this _____ day of September, 2007, by BOARD OF COUNTY COMMISSIONERS OF FREDERICK COUNTY, MARYLAND, a body politic and corporate of the State of Maryland, Grantor, and DAIRY MAID DAIRY, INC., a body corporate of the State of Maryland, Grantee:

WITNESSETH, there being no money consideration paid as hereinafter shown, the said Grantor does hereby grant and convey unto Grantee all those tracts or parcels of land situate,, lying and being in Frederick City, Frederick County, Maryland, and more particularly described as follows:

BEGINNING for the same at an iron pipe found on the East margin of Vernon Avenue and the Southwest corner of a 20 foot alley, said point being the Northwest corner of the entire property and running thence with the Southern boundary of said 20 foot alley South 85° 21' 00" East 110.00 feet to an iron pipe found, South 73° 10' 00" East 23.00 feet to an iron pipe found South 85° 56' 00" East 1.44 feet to an iron pipe found at the Northwest corner of a certain tract belonging to Frederick City and found among the Land Records of Frederick County, Maryland in Liber 623 at folio 479, and 481 and running thence with the Western boundary of Said Frederick City tract South 5° 38' 00" West 107.00 feet to an iron pipe found, thence with the Southern boundary of said tract South 84° 22' 00" East 122.80 feet to an iron pipe found on the Western boundary of the Frederick Iron and Steel Company, thence with said Western boundary South 5° 54' 00" West 227.00 feet to a metal post found on the Northern margin of East 7th Street and 13.25 feet from the face of the curb and being the Southeast corner of the entire tract as now described, thence with the Northern margin of East 7th Street and 13.25 feet from the existing curb North 85° 14' 29" West 224.84 feet to an iron pipe found 30 feet from the Eastern margin of said Vernon Avenue, said point being the Southeast corner of Frank Biddinger lot

as found in Liber 645, at folio 50 and running thence with the Eastern boundary of said Biddinger lot North 5° 54' 08" East 114.70 feet to an iron pipe found, thence still North 5° 54' 08" East 31.84 feet to R. Baker property as found in Liber 494, folio 114, thence with said Baker property the following five courses and distances, South 84° 22' 00" East 40.00 feet to an iron pipe found North 5° 54' 00" East 20.00 feet South 84° 22' 00" East 52.00 feet to an iron pipe found, North 5° 54' 00" East 50.00 feet to an iron pipe found, North 84° 22' 00" West 122.00 feet to an iron pipe found on the Eastern margin of said Vernon Avenue thence with said Vernon Avenue North 5° 54' 00" East 123.75 feet to the place of beginning, containing 61, 234 square feet or 1.406 acres of land, more or less.

The above described metes and bounds description is shown on a Plat prepared by Wilbur L Ford, Jr., Registered Land Surveyor, entitled "Plat of Survey of Dairy Maid Dairy", and as also described in the following Deed references, to wit:

(1) Being all and the same real estate described and conveyed in a Deed from E. Bryan Rice and Margaret C. Rice, to Dairy Maid Dairy, Inc., a body corporate of the State of Maryland, dated June 15, 1966 and recorded in Liber 749, folio 135, one of the Land Records of Frederick County, Maryland.

(2) Being all and the same real estate described and conveyed in a Deed from Russell E. Provard and Mary E. Provard, his wife, to Joseph Vona and Helene G. Vona, his wife, dated July 1, 1946 and recorded in Liber 455, folio 183, one of the Land Records of Frederick County, Maryland.

TOGETHER with all and singular the buildings, improvements, rights, ways, privileges and appurtenances thereunto belonging or in anywise appertaining, and also all the fixtures, dairy equipment, personal property, good will and trade-marks used in connection with the operation of the said Excelsior Sanitary Dairy.

(3) Being all and the same real estate described and conveyed in a Deed from Pauline Koontz, widow, unto Joseph Vona and Helene G. Vona, his wife, dated April 22, 1957 and recorded in Liber 581, folio 325, one of the Land Records of Frederick County, Maryland.

(4) Being all and the same real estate describe and conveyed in a Deed from Curtis P. Mabie, Jr., and Theda W. Mabie, his wife, to

Joseph Vona and Helene G. Vona, his wife, dated July 31, 1973 and recorded in Liber 919, folio 678, one of the Land Records of Frederick County, Maryland.

TOGETHER with all the rights, ways, easements and appurtenances thereunto belonging or in anywise appertaining, SUBJECT, HOWEVER, to the following covenant:

"That the Lot or land herein conveyed shall be known and described as a residential lot and shall be limited to the uses and purposes for residential land as shall from time to time be enumerated in the Code for the City of Frederick, Maryland. This restrictive covenant shall be binding upon the grantees herein, their heirs and assigns, and is intended to be a covenant running with the land."

(5) Being all and the same real estate described and conveyed in a Deed from Joseph Vona and Helene G. Vona his wife, Parties of the First Part and Dairy Maid Dairy Inc., a body corporate of the State of Maryland, Party of the Second Part to County Commissioners of Frederick County, Maryland, a body politic and corporate of the State of Maryland, Party of the Third Part, dated April 4, 1979, and recorded in Liber 1079, folio 9, one of the Land Records of Frederick County, Maryland.

To which said Deed and Plat and the references therein contained, reference is hereby made for a more particular description of the land and premises herein intended to be conveyed.

THIS DEED is subject to any rights-of-ways of record.

TO HAVE AND TO HOLD the above described real estate unto the said Dairy Maid Dairy, Inc. a body corporate of the State of Maryland, its successors and assigns, in fee simple, forever.

And the said Grantor herein does hereby covenant that it will warrant specially the property hereby conveyed and that it will execute such further assurances of said land as may be requisite.

WITNESS the hand and seal of the Grantor on the day and year first hereinbefore written.

ATTEST:

BOARD OF COUNTY COMMISSIONERS
OF FREDERICK COUNTY, MARYLAND

BY: _____
Jan H. Gardner, President

STATE OF MARYLAND, COUNTY OF FREDERICK, to wit:

I HEREBY CERTIFY, that on this ____ day of September, 2007, before me, the subscriber, a Notary Public in and for the State and County aforesaid, personally appeared Jan H. Gardner, President of the Board of County Commissioners of Frederick County, Maryland, a body politic of the State of Maryland, and acknowledged the foregoing DEED to be the act of said body politic and corporate; and at the same time she made oath in due form of law that she is the President of said body politic and corporate and is duly authorized to make this acknowledgment on its behalf.

WITNESS my hand and Notarial Seal.

Notary Public

My Commission expires: _____

I HEREBY CERTIFY that this deed was prepared under the supervision of an attorney admitted to practice before the Court of Appeals of Maryland.

George T. Tyler

BILL OF SALE

WHEREAS, by means of a certain Bill of Sale dated April 4, 1979, from Dairy Maid Dairy, Inc., a Maryland corporation, to Board of County Commissioners of Frederick County, Maryland, a body corporate and politic of the State of Maryland, which Bill of Sale was given as further security for a loan from said County Commissioners to Dairy Maid, pursuant to provisions of the MIDFA Act, the items of equipment listed on Exhibit A attached hereto and made a part hereof were sold, conveyed and delivered to said County Commissioners.

AND, WHEREAS, the said loan having been paid in full and discharged by Dairy Maid the said County Commissioners intend to restore full ownership of the said items of equipment to Dairy Maid.

NOW, THEREFORE, by these presents the Board of County Commissioners of Frederick County, Maryland (the "Seller") in consideration of the sum of Ten Dollars (\$10.00) and for other good and valuable consideration, the receipt of which is hereby acknowledged, does bargain sell, convey and deliver unto Dairy Maid Dairy, Inc. all of the machinery and equipment now located upon, affixed and not affixed, to that certain 17,000 square foot dry storage and manufacturing facility constructed as an addition, extension, and permanent improvement to the existing manufacturing facility, and located at 706 Vernon Avenue, Frederick, Maryland, in Frederick County, including but not limited to the machinery and equipment listed on Exhibit A attached hereto and made a part hereof. Seller, by so doing, does not warrant, expressly or by implication, and does not represent that the said machinery and equipment is in existence or is so located, and Seller, by this Bill of Sale, intends only to quit claim

for itself alone any ownership interest in the machinery and equipment of Dairy Maid Dairy, Inc. which it acquired by means of that certain Bill of Sale dated April 4, 1979, described herein.

WITNESS the seal of the Seller and the signature of its President this _____ day of September, 2007.

ATTEST:

BOARD OF COUNTY COMMISSIONERS
OF FREDERICK COUNTY, MARYLAND

BY: _____
Jan H. Gardner, President

DAIRY MAID DAIRY
NEW EQUIPMENT LIST & ANTICIPATED SUPPLIERS

- I. Refrigeration System
 - A. Compressor 5x5x6 - Creapaco
 - B. Starter & Disconnect - Mid-Maryland Electric
 - C. Ice Builder - Creapaco
 - D. Receiver of Ammonia - Creapaco
 - E. Installation - Joseph Vona

- II. Automatic Standardizing & Blending System - North Atlantic Equipment Co.
 - A. Installation - G.M.C., Inc.

- III. Compressed Air System
 - A. Compressor- Sullair
 - B. After cooler - Airtek
 - C. Air Dryer - Sullair